

DECISION

Dispute Codes: OPR, MNR, MNSD and FF

Introduction

This application was brought by the landlord seeking an Order of Possession pursuant to a Notice to End Tenancy for unpaid rent served by on January 6, 2010. The landlord also sought a Monetary Order for the unpaid rent and recovery of the filing fee for this proceeding. In addition, I have exercised the discretion granted at section 64(3)(c) of the *Act* to permit the landlord to amend his application to request authorization to retain the security deposit in set off against the balance owed.

At the commencement of the hearing, it was established that the tenants had vacated the rental unit on January 30, 2010 and there was no need to consider the request for an Order of Possession.

Issues to be Decided

This application requires a decision on whether the landlord is entitled to a Monetary Order for the unpaid rent and filing fee, and authorization to retain the security deposit in set off.

Background and Evidence

This tenancy began on April 1, 2009 under a fixed term rental agreement to March 31, 2010. Rent is was \$1,500 per month and the landlord holds a security deposit of \$750 paid on April 1, 2010.

During the hearing, the landlord gave evidence that the Notice to End Tenancy had been served when the tenants had not paid rent for August 2009, December 2009 or January 2010. The Notice to End Tenancy set an end of tenancy date of March 31, 2010.

The parties concurred that the tenants left at the end of January 2010 without giving written notice.

As the tenants have breached the fixed term agreement, the landlord also seeks loss of rent for February and March 2010.

As a matter of note, the property has been sold and the purchasers are scheduled to take possession on March 31, 2010.

While the tenant concurred that no rent had been paid for December and January, he stated that an NSF cheque for August rent had been replaced with cash. The tenant also contested whether they should be responsible for the rent for February and March as the tenancy had ended on a Notice to End Tenancy.

Analysis

On the matter of the August rent, the burden of proof on a monetary claim lies with the party making the claim. In this instance, the landlord has not submitted a tenant's ledger recording rent payments, no copy of the NSF cheque, no copies from a number receipt book or any other evidence to prove the contested payments. Therefore, I cannot award rent for August. There is no question as to the December and January rents as the tenant concurred that they were not paid.

As the tenant's vacated at the end of January without giving notice, and particularly as the Notice to End Tenancy set an end of tenancy date at March 31, 2010, I find that the tenant's also owe the rent for February.

While I had considered that with the pending closing of the sale of the property on March 31, 2010 and given that the landlord had gained possession at the end of January, that the landlord had failed to "do whatever is reasonable to minimize the damage or loss" as required under section 7(2) of the *Act*.

However, on reflection, I find that the landlord had been placed in a practically untenable position by the tenant's failure to pay rent. Even if they had given notice, it could not have taken effect before the end of tenancy date on the fixed term rental agreement under section 45(2)(b) of the *Act*. As the landlord could have only offered the property for little more than a month, it is highly unlikely he could have secured tenants for the brief period.

In addition, I accept the evidence of the landlord that he attempted to close the sale sooner, but the purchaser declined.

Therefore, as the landlord made only a partial effort to minimize his loss, and as that loss resulted from the tenant's breach of the fixed term agreement, I find that the loss of rent for March should be split equally between the parties.

Thus, I find that, including recovery of the filing fee for this proceeding and authorization to retain the security deposit in set off against the balance, the tenants owe the landlord an amount calculated as follows:

Rent for December 2009	\$1,500.00
Rent for January 2010	1,500.00
Rent for February 2010	1,500.00
Rent for one-half of March 2010	750.00
Filing fees	100.00
Sub total	\$5,350.00
Less retained security deposit (No interest due)	- 750.00
TOTAL	\$4,600.00

Conclusion

In addition to authorization to retain the security deposit in set off, the landlord is also issued with a Monetary Order for \$4,600, enforceable through the Provincial Court of British Columbia, for service on the tenants.

The tenant declined to provide a forwarding address and requested that his copy of this decision be forwarded to the address of the rental unit

March 1, 2010